

Decision Notice



Decision 127/2008 Dr Gordon Macdonald and South Lanarkshire Council

Correspondence to or from a named Councillor

Reference No: 200800230, 200800664, 200801067
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Scottish Information Commissioner

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Summary

This decision notice considers the responses made by South Lanarkshire Council (the Council) to three requests from Dr Gordon Macdonald for information about correspondence to and from a named Councillor.

The Council advised Dr Macdonald that it did not hold the information he requested. The Council took the view that some of the correspondence, if it existed, would be held by the Council on behalf of another Scottish public authority.

After requiring the Council to review its response to each of his requests, Dr Macdonald applied to the Scottish Information Commissioner (the Commissioner) for a decision on whether the Council had complied with the Freedom of Information (Scotland) Act 2002 (FOISA) in dealing with his requests.

During the Commissioner's investigation the Council carried out searches to establish whether any information relevant to Dr Macdonald's requests was held, regardless of the ownership issue. No information was found.

The Commissioner found that the Council had complied with Part 1 of FOISA in notifying Dr Macdonald that the information he requested was not held by it.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); section 3(2)(a)(i) (Scottish public authorities) and section 17 (Notice that information is not held)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Background

First request

1. On 6 December 2007, Dr Gordon Macdonald wrote to the Council requesting copies of all correspondence, including emails, between a named Councillor and members of the Management Team of Strathclyde Fire and Rescue Service (SFR) and/or officials of the Fire Brigades Union, between 19 June 2006 and 31 August 2006. (This request was one in a series of related information requests Dr Macdonald had previously submitted to the Council.)



2. It may be helpful to explain that the Councillor named by Dr Macdonald had served on Strathclyde Fire Board (the Board) during the period covered by his request. The Council's responsibilities as a fire authority are delegated to the Board, which is a joint board serving as the fire authority for twelve local authorities, and which is a Scottish public authority for the purposes of FOISA. Councillors from the twelve constituent local authorities are appointed to serve on the Board. The day to day running of the fire service is carried out by SFR.
3. The Council responded to Dr Macdonald's request of 6 December 2007 on 14 January 2008, in a letter which included responses to other requests not considered further in this decision notice. The Council advised Dr Macdonald that in terms of section 17 of FOISA it did not hold any information covered by his request. The Council took the view that if the named Councillor, as a private individual or as a member of the Board, had sent or received emails or other correspondence through the Council's email system or other support provided to Councillors, he was not acting as a member of the Council. As the Council did not access, use, or have any control over the management of such information, the Council considered that it would not hold the information (for the purposes of FOISA) even if it existed on the Council's records management system.
4. Under section 3(2)(a)(i) of FOISA, information is only held by an authority for the purposes of FOISA if it is held otherwise than on behalf of another person. In a situation where one public authority holds information on behalf of another public authority, the decision to release or withhold the information under FOISA remains with the depositing authority.
5. The Council advised that it had searched its own records, excluding records held on behalf of the Board, and did not have any of the requested information.
6. The Council explained that it provides administrative support to the Board, including the preparation of agendas and minutes of meeting and correspondence on behalf of the Clerk to the Board. To assist Dr Macdonald, the secretariat of the Board had been asked if they held any correspondence covered by his request. The secretariat had advised that Board members would usually prepare correspondence without using its services. The secretariat confirmed that it did not have any of the requested correspondence.
7. Dr Macdonald requested a review of the Council's response on 16 January 2008, focusing on four points where he disagreed with the Council's position:
 - a) Any correspondence by the Councillor using Council facilities should be considered relevant to his role as a Councillor, as the facilities were not provided for his use as a private individual.
 - b) As a member of the Board, the Councillor was acting in his capacity as a Councillor owing to his appointment having been made by the Council.
 - c) Another Council had released copies of correspondence sent by a Councillor in his role as a member of the Board, suggesting a different interpretation of FOISA.
 - d) If the Council took the view that the information in its possession was under the control of SFR, the Council should have asked SFR if the information could be released.



8. On 12 February 2008 the Council provided its review response to Dr Macdonald. The review panel decided to confirm the decision that the Council did not hold the information and refused the request in terms of section 17 of FOISA.
9. The Council considered that the test of whether it holds information on behalf of another party is a test of control: for example, the ability to delete or amend information without that party's consent; or the ability to apply the Council's record retention policy or to include the information in its publication scheme. The Council had identified two possible locations for the information: these were the files used by officers of the Council in connection with the Clerk to the Board; and the Councillor's personal folders and computer, including his email box. The Council considered it had no control over information held in either location.
10. The Council commented on the other points raised by Dr Macdonald. It advised that where an elected member is not acting in a role that makes him or her part of the Council, he/she is acting in a private capacity. However, limited support facilities were provided to elected members fulfilling roles other than as part of the Council, including membership of external bodies. The Council may have correspondence or records on behalf of Councillors as members of these external bodies, but this information is held on behalf of the Councillor as a private individual, or on behalf of the external body.
11. In relation to the point made about similar information disclosed by another Council, the Council took the view that it must come to its own decision on whether to release information. The Council also decided that it did not have an obligation to consult with the Board to ask whether information could be released.
12. Dr Macdonald remained dissatisfied with the Council's response, and applied to the Commissioner for a decision in terms of section 47(1) of FOISA on 15 February 2008.
13. The application was validated by establishing that Dr Macdonald had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

Second request

14. On 15 February 2008 Dr Macdonald made a second information request to the Council. He asked for a list of all correspondence in the Council's possession but held on behalf of SFR which related to his information request of 6 December 2007 (see paragraph 1 above). (This request is understood to relate to information held on behalf of the Board, rather than SFR.)



15. On 14 March 2008 the Council advised that in terms of section 17 of FOISA, the information was not held, as the Council did not maintain an index of all correspondence held on behalf of the Board. However, the Council had asked the Secretariat of the Board what information it held in relation to Dr Macdonald's request. The Secretariat held correspondence in files, which were indexed, but there was no sub index covering individual pieces of correspondence. A list of files held by the Secretariat was enclosed with the Council's response to Dr Macdonald.
16. On 20 March 2008 Dr Macdonald requested a review of the Council's response on the basis that the Council had not provided a list of relevant correspondence from the Councillor named in his request of 6 December 2007. He believed it would be easy for the Council to check the Councillor's email records to see if any emails had been sent to managers at SFR during the relevant period. He re-stated his request of 15 February 2008 to make it clear that he was looking for a list of correspondence covered by his request of 6 December 2007 and held on behalf of the Board.
17. On 10 April 2008 the Council notified Dr Macdonald that after reviewing its response to his request, it had upheld the decision that the information was not held. The review panel had decided that Dr Macdonald's request was for a specific piece of information, i.e. a list of correspondence held by the Council on behalf of either the Board or the named Councillor. The review panel did not consider it was within its powers to require the creation of any such list. It therefore considered where such a list might be held, within the Council, and identified three possible locations: Administration Services, where the files of the Secretariat to the Joint Board were kept; the Councillor's personal correspondence folders in Member Services; and the Councillor's email boxes. Each of these areas was asked whether it held a list of correspondence covered by Dr Macdonald's request, on behalf of either the Board or the Councillor. Administration Services and Member Services confirmed that no list was kept; Member Services further confirmed that it did not hold any correspondence on behalf of the Councillor or any correspondence to the named recipients.
18. In relation to the Councillor's email folders of sent and received correspondence, the Council advised that it did not have a list of this correspondence. It acknowledged that the information could be produced from its server. However, the Council considered that this would involve using information which the Council did not hold in its own right.
19. On 29 April 2008 Dr Macdonald wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. Dr Macdonald argued that by failing to check whether any relevant emails were held on its server, the Council had failed to comply with FOISA: it had a responsibility to ensure that any information relevant to his request which was held by the Council, or on behalf of the Council by a third party, should be released to him unless one of the exceptions in FOISA applied.
20. The application was validated by establishing that Dr Macdonald had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.



Third request

21. On 29 April 2008 Dr Macdonald made another information request to the Council, in which he asked for copies of all emails sent from or received by the named Councillor's email account to or from the email account of a named Councillor from North Lanarkshire Council during the period 19 June 2006 to 31 August 2006.
22. A similar information request was submitted to North Lanarkshire Council on the same day, and is the subject of a separate decision notice.¹
23. On 28 May 2008 the Council sent its response to Dr Macdonald. It advised that it did not hold the information requested. It explained that there were only two areas in which such emails could be located, which were the Councillor's personal email account and the files of the Secretariat of the Board.
24. In relation to the Councillor's email account, the Council advised that the emails, if they existed, were not located on the accessible part of the server, and that Council procedure was to delete from the server all emails older than six months. The Council acknowledged that the Councillor may have retained emails in his personal email archive, and listed the places where such an archive might be held. The Council took the view that any emails retained in this way would be held by the Council on behalf of the Councillor, and would not be held by the Council in terms of FOISA. The Council confirmed that it did not know whether any relevant emails existed.
25. In relation to information held by the Secretariat to the Board, the Council reiterated its view that such information would be held on behalf of the Board. However, it was understood by the Council that no such emails or copies of emails existed.
26. Dr Macdonald asked for a review of the Council's response on 9 June 2008. He complained that the Council had not checked the Councillor's private network area on the Council's server, or the computer/laptop computer provided for the Councillor by the Council, or any separate files that the Councillor may have stored on the Council network, to see whether any relevant emails existed.
27. Dr Macdonald challenged the Council's interpretation of whether information was "held" in terms of FOISA, on grounds very similar to those listed in paragraph 7 above.
28. The Council replied on 8 July 2008. It advised Dr Macdonald that following discussions with the Commissioner's Office in relation to other matters, it had agreed to carry out a similar search to that described in Dr Macdonald's letter of 9 June 2008. Under the circumstances, the review panel had referred the matter back to the Council's Administration Services, asking them to contact Dr Macdonald on the outcome of the search.

¹ Decision 129/2008 Dr Gordon Macdonald and North Lanarkshire Council



29. On 17 July 2008 Dr Macdonald applied to the Commissioner for a decision in terms of section 47(1) of FOISA. He raised concerns that the search which the Council had agreed to carry out would focus on emails sent from the Councillor's account to or from email addresses ending "@strathclydefire.org". He argued that this search would not retrieve emails exchanged with the named Councillor from North Lanarkshire Council, and asked the Commissioner to instruct the Council to carry out a wider search based on a list of search terms provided in his letter.
30. Dr Macdonald's application was validated by establishing that he had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

Investigation

31. Because of the close relationship between Dr Macdonald's three requests to the Council, it was decided to consider his three applications to the Commissioner in a single decision notice. The investigation of the earlier applications has, necessarily, been influenced by the information and views emerging from Dr Macdonald's ongoing correspondence with the Council and the searches undertaken by the Council during the period of investigation. Two other related applications from Dr Macdonald involving other public authorities have also been investigated during this period and the outcome of these investigations has also been taken into account, where relevant, when reaching a decision on the applications currently under consideration.
32. After each application for a decision was received, the Council was contacted by the investigating officer and was provided with a copy of Dr Macdonald's application to the Commissioner. Comments on each application were invited, as required by section 49(3)(a) of FOISA.

Request 1 - investigation

33. In relation to Dr Macdonald's first application (request 1), the Council was asked (26 February 2008) whether it was aware of any communication which would fall within the scope of his request, regardless of whether such information was considered to be "held" by the Council for the purposes of FOISA. The Council was also asked about the relationship between the Council and the Board.
34. The Council replied on 14 March 2008. It advised that it was unaware whether the named Councillor had any of the information requested: the Council had not searched the Councillor's email account to determine if there was any correspondence covered by the request. However, in informal discussions, the Councillor had advised that he did not and had not ever had any of the requested information.



35. The Council also provided information about its relationship with the Board, as one of the constituent fire authorities empowered to nominate elected members to serve on the Board. The Council provided citations of the legislation providing the statutory basis for the relationship, and a copy of the relevant Amalgamation Scheme under the Fire (Scotland) Act 2005. The Council also provided information about the administrative and other support services which the Council places at the disposal of the Board.
36. During the investigation, Dr Macdonald contacted the Commissioner's Office to advise that he had been given copies of the named Councillor's mobile phone records (showing records of phone calls made to the switchboard of SFR), and noting that in relation to this request the Council had not argued that the information was not "held" or that the Councillor was acting in his capacity as a member of the Board.

Request 2 - investigation

37. On 13 May 2008 the Council was asked to comment on certain aspects of its response to Dr Macdonald's second request. It was noted that the review panel had decided it was not within the Council's power to require the creation of a list of relevant correspondence. The Council was advised that, although Scottish public authorities are not required to create information in response to a request, the Commissioner has previously made it clear that this does not extend to the compilation of data already existing within the public authority, and the Commissioner did not consider compiling information from a variety of sources to be the creation of new information.
38. The Council was asked whether it would be prepared to carry out searches to establish what relevant information, if any, was held on its servers, to inform any further discussion of whether the information was held by the Council in its own right or held on behalf of another party.
39. On 20 June 2008 the Council confirmed that it would access the Councillor's email folders and personal computer to compile a list of correspondence held there. As Dr Macdonald's request was for correspondence to and from the management team of SFR, it was proposed that the search should be for emails with "@strathclydefire.org" in the recipient or sender's address.
40. On 11 July 2008, the Council confirmed that a search had been carried out and that no relevant information had been retrieved. Full details of the search were provided on 2 September 2008 (see paragraph 42 below).

Request 3 - investigation

41. On 22 July 2008 the Council was asked to comment on Dr Macdonald's third application to the Commissioner, and in particular his requests for certain searches to be carried out for emails exchanged between the named Councillor and a Councillor from North Lanarkshire Council. The Council was asked to provide full details of any search carried out in relation to Dr Macdonald's request.



42. On 2 September 2008 the Council provided full details of the searches carried out in relation to requests 2 and 3. The Council confirmed that no emails at all from the period covered by Dr Macdonald's requests were found on the email server, network server, or personal computer used by the Councillor.
43. The Council provided the Commissioner with additional information about the basis on which email facilities are made available to elected members.

Commissioner's analysis and findings

44. The Commissioner has found no evidence that any information covered by the terms of Dr Macdonald's requests is in existence, regardless of the question whether such information would be held by the Council for the purposes of FOISA. As noted previously, the Commissioner has concurrently investigated other applications from Dr Macdonald concerning related correspondence held by Strathclyde Fire Board and North Lanarkshire Council. The investigations into these applications have also failed to show that any of the information requested is held (in their own right or on behalf of another party) by any of the public authorities involved.
45. The Commissioner accepts that the Council has carried out searches which have established that there are no records of any emails sent or received by the named Councillor during the period covered by Dr Macdonald's request. The Commissioner notes that no relevant emails of any description were found on the email server, network server, or personal computer used by the Councillor and accepts that it was therefore irrelevant that the search term originally proposed by the Council (emails ending in "@strathclydefire.org") would not have retrieved correspondence covered by request 3.
46. The Commissioner accepts that the Council was correct to notify Dr Macdonald that the requested information was not held, in terms of section 17 of FOISA: this conclusion is based on the fact that the Council has demonstrated to the satisfaction of the Commissioner that the information did not physically exist within their systems.
47. The Commissioner notes that in relation to request 1, Dr Macdonald asked for a decision notice which would address the disagreement over which organisation had responsibility to release the information requested.



48. In previous decisions the Commissioner has indicated that where a Council holds copies of correspondence sent or received by a Councillor, such information is held on behalf of the Councillor unless it directly concerns Council business. In *Decision 132/2006 Mr John Egan and West Dunbartonshire Council* the Commissioner noted:
- “There do not appear to be any set rules on when a councillor is and is not acting on behalf of a council, although the Councillors’ Code of Conduct from the Standards Commission for Scotland draws a clear distinction between Council duties and party political or campaigning activities. I have taken the view that information relating to a Councillor’s party political activities or constituency business is not held by the Council for the purposes of FOISA; only information relating to activities in which the Councillor is acting on behalf of the Council is covered by the legislation. In coming to this view I have taken account of the Information Commissioner’s guidance on the implications of the Data Protection Act for Councillors. This guidance appears to suggest that that only when the Councillor is acting as a member of the Council (i.e. in pursuance of its corporate functions) are they part of the Council.”
49. Given that no relevant information is held in any sense, the Commissioner does not find it necessary on this occasion to consider in detail the issues of ownership in order to reach a decision on whether the Council complied with FOISA in responding to Dr Macdonald’s request.
50. The Commissioner finds that the Council complied with part 1 of FOISA by correctly notifying Dr Macdonald, in terms of section 17 of FOISA, that the information he requested on 6 December 2007, 15 February 2008, and 29 April 2008 was not held by the Council.

DECISION

The Commissioner finds that South Lanarkshire Council acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information requests made by Dr Gordon Macdonald.



Appeal

Should either Dr Macdonald or the Council wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision notice.

Margaret Keyse
Head of Investigations
30 September 2008



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

3 Scottish public authorities

....

- (2) For the purposes of this Act but subject to subsection (4), information is held by an authority if it is held-
- (a) by the authority otherwise than-
- (i) on behalf of another person; or

...

17 Notice that information is not held

- (1) Where-
- (a) a Scottish public authority receives a request which would require it either-
- (i) to comply with section 1(1); or
- (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

- (b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.